Supreme Court, U.S.
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No. 02-329

(4)

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID A. MONTS,
Petitioner

vs.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AGRICULTURAL AND MECHANICAL COLLEGE D/B/A UNIVERSITY OF NEW ORLEANS, PATRICK M. GIBBS, FRANK H. SCHAMBACH, AND GUSTAVE S. CANTRELL,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

PETITIONER'S REPLY BRIEF

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MAY IT PLEASE THE COURT:

Petitioner Monts, through undersigned counsel, respectfully submits this reply brief in support of his petition for certiorari and in response to the opposition filed by respondents the Board of Supervisors d/b/a UNO, Gibbs, Schambach, and Cantrell.

1. Petitioner's Position

In their opposition, respondents state: "it is Petitioner's position, that all public employee criticism is protected speech, that runs directly contrary to this Court's jurisprudence" (Oppos., p. 2). If that were Monts's position, respondents' statement would be correct. But "that all public employee criticism is protected speech" is not Monts's position. Rather, Monts's position is that his reports to respondents and their attorneys of information involving fire and safety code violations, the unauthorized practice of engineering, and other improper and illegal acts on the UNO campus addressed matters of public concern within the ambit of First Amendment protection. That is the position the Louisiana court of appeal rejected when it held that, as a matter of law, Monts's communications were "not matters sufficiently infused with public interest to support his First Amendment retaliation claim" and "were not primarily matters of public concern, and thus, not protected speech" (Append. B, p. A-8). Hence, the question presented to this Court is not, as respondents fancy, whether "all public employee criticism is protected speech," but whether Monts's communications were protected speech.

2. Fire and Safety Code Violations

Respondents accuse Monts of suggesting or implying "that the Fourth Circuit ruled that *all* violations of safety or building codes are not matters of public concern" (Oppos., p. 8) (emphasis in original). But again, Monts does not say that. Monts simply points out that the Louisiana court of appeal, in

its analysis of the *content* of Monts's communications, held that the specific code violations Monts reported "cannot be said to be major matters of public safety" and "are not matters sufficiently infused with public interest to support his First Amendment retaliation claim" (Append. B, p. A-8). If Monts's reference to the state court's own words suggests or implies anything, it is that the state court's decision that *any* violations of safety or building codes are not matters of public concern is constitutionally flawed.

The Louisiana Legislature enacted the *Louisiana Building Code for State Owned Buildings Law*, La. R.S. 40:1721 *et seq.*, adopting the Life Safety Code, the National Electric Code, and other codes "to insure the public health and safety . . . in the new construction, alterations, additions for renovations of state buildings." La. R.S. 40:1721 (Append. E, p. A-23). Furthermore, the Legislature recognizes the important role professional engineers play in the enforcement of such codes insofar as the law regulates the practice of engineering "[i]n order to safeguard life, health, and property, and to promote the public welfare . . . ." La. R.S. 37:681 (Append. E, p. A-24); directs professional engineers to "at all times recognize that their primary obligation is to protect the safety, health, property, and welfare of the public," LAC 46:2103](B) (Append. E, p. A-27); requires professional engineers to exercise "responsible charge" over engineering design decisions, La. R.S. 37:682(12) (Append. E, p. A-25); and requires professional engineers to report "any observed conditions which endanger public safety and health," LAC 46:2103(B) (Append. E, p. A-27).

In view of these express declarations of public purpose, it follows as a matter of law that a professional engineer's reports of *any* violations of the Louisiana Building Code for State Owned Buildings address matters of public concern within the ambit of First Amendment protection. As the Second Circuit pointed out in an analogous context in *Munafo v. Metropolitan Transportation Authority*, 285 F.3d 201 (2d Cir.

2002): "If one needed to consult more than common sense, one would need look no farther than the existence of the Occupational Safety and Health Act of 1970 . . . and similar state laws . . . to recognize that safety in the workplace is a matter of public concern" (citations omitted). Here, in finding that the specific code violations Monts reported "cannot be said to be major matters of public safety" and "are not matters sufficiently infused with public interest to support his First Amendment retaliation claim" (Append. B, p. A-8), the Louisiana court of appeal not only failed to consult common sense but also failed to credit the Louisiana legislature's express purpose in enacting the Louisiana Building Code for State Owned Buildings "to insure the public health and safety," La. R.S. 40:1721, and in enacting the Louisiana Registration Law for Professional Engineers and Land Surveyors "to safeguard life, health, and property, and to promote the public welfare," La. R.S. 37:681.

Moreover, contrary to respondents' contention that "there is no actual evidence of code violations in the record" (Oppos., p. 9), Monts--whose credentials as a Professional Electrical and Nuclear Engineer are undisputed (Append. F, p. A-28)--has meticulously specified objectively observable facts which he in his expertise reasonably believed constituted violations of the Life Safety Code and National Electric Code on the UNO campus and which he conscientiously reported to UNO officials and UNO's attorneys (Append. F, p. A-31). On the other hand, the record contains absolutely no factual, technical, or legal support for respondents' and the Louisiana court of appeal's speculation that the alleged code violations were not "code violations at all" or were "seemingly minor deviations from the purest building practices" (Append. B., p. A-8). On the contrary, the affidavits of Monts (Append. F, p. A-28), John Ehlers, P.E. (Append. G, p. A-84), and Allan Anderson, P.E. (Append. H, p. A-90) all establish the existence of code violations and the unauthorized practice of engineering on the UNO campus. Even John Michael Parnon-

-Monts's supervisor who signed Monts's termination letter (Append. I, p. A-94)--admitted in his deposition:

> Q. Did Mr. Monts complain about what he perceived to be code violations or practicing engineering without a license by Gus [Cantrell] or Frank [Schambach]? Did he complain about such things at the weekly staff meetings that you had?
>
> A. It came up occasionally.

(Parnon Depo., p. 157).

In short, the Louisiana court of appeal's decision that Monts's reports of violations of safety or building codes did not address matters of public concern is, on its face, erroneous as a matter of constitutional law and contrary to public policy.

3. Internal and Private Speech

Respondents state that the Louisiana court of appeal "*nowhere even suggests* that the private or 'internal' nature of the speech *per se* precludes First Amendment protection" (Oppos., p. 6) (emphasis in original), and Monts agrees with that statement. Nevertheless, a plain reading of the state court's opinion reveals that in its analysis of the *context and form* of Monts's communications, the court relied *explicitly and exclusively* on its finding that the communications were "internal" (Append. B, p. A-8).

Nowhere in the Louisiana court of appeal's analysis of the *context* of Monts's communications does the court consider any factor other than its finding that the communications "were *internal* and more specifically, *internal* within the Physical Plant Services Department" (Append. B, p. A-8) (emphasis added). The court supports this finding by pointing out the negative: Monts "made no complaints to other UNO officials, nor did he report the purported

misconduct to the State Board of Ethics" (Append. B, p. A-8). Similarly, in its analysis of the *form* of Monts's communications, the court notes only that "all of Monts' complaints, *either verbal or in memoranda*, were *internal*" (Append. B., p. A-8) (emphasis added). The court of appeal thus concludes that the *internal form* ("verbal or in memoranda") and *internal context* ("within the Physical Plant Services Department") "of Monts' expression militate against the finding that he was addressing matters of public concern as a citizen, rather than as a disgruntled employee," and that therefore "Monts' internal complaints were not primarily matters of public concern, and thus, not protected speech" (Append. B., p. A-8).

So notwithstanding respondents' protestations, the Louisiana court of appeal *did* find that the internal and private context and form of Monts's speech precludes First Amendment protection. As such, the state court's decision conflicts with this Court's unanimous decision in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), that a public employee does not forfeit "his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly." See also *Rankin v. McPherson*, 483 U.S. 378, 386 n.11, 107 S.Ct. 2891, 107 L.Ed.2d 2891 (1987) ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern").

Moreover, in concluding that the "internal" form and context of Monts's communications "militate against the finding that he was addressing matters of public concern as a citizen, rather than as a disgruntled employee" (Append. B., p. A-8), the Louisiana court of appeal completely misconstrues and misapplies the *Pickering/Connick* balancing test whereby the court "must arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs

through its employees." *Connick v. Myers*, 461 U.S. 138, 150, 103 S.Ct. 1684, 75 L.Ed.2d 708, 722 (1983). For even as respondents have failed to produce a shred of evidence that anything Monts said or did impaired the efficiency of the services UNO performed through its employees, the state court of appeal ignores this Court's cautions in *Connick* that "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression," and that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 150, 154, 75 L.Ed.2d at 722, 724. Indeed, respondents' conclusory argument that "the context and form of Monts's expression supported the finding that he was not addressing matters of public concern as a citizen, but was acting as a disgruntled employee" (Oppos., p. 12) mirrors the defendants' argument in *Munafo*, 285 F.3d at 201, that Munafo's complaints of "trackworkers' being forced to operate in unlawful proximity to live rails without protective gear, welders' being forced to work without respirators, and drivers' being assigned vehicles with faulty brakes" "were no more than internal personal grievances relating to matters of his own personal interest," and the Court's response to that argument is equally applicable in this case: "Given the requirements that we accept the allegations of the complaint as true and take the record in the light most favorable to Munafo as the party against whom summary judgment is sought, *defendants' premise borders on the frivolous*" (emphasis added).

4. Summary Judgment

Knowing that this case was decided *on summary judgment*, respondents state that "Monts's statement that 'no trier of fact has yet decided the issue of motive or the ancillary issue of pretext' is simply wrong" (Oppos., p. 17 n.5). In support of their implication that the issues of motive and pretext were decided by a "trier of fact," respondents cite the

state trial court's finding *on summary judgment* that "the substantially motivating factor in plaintiff's discharge was his disruptive behavior, negative attitude and divisive actions in disseminating information concerning the salaries of co-employees and his superiors." However, even a cursory review of just the affidavits contained in the Appendix to Monts's Petition for Certiorari shows that the only way the trial court could have decided those issues and granted summary judgment on this record was to consider the merits, make credibility determinations, evaluate testimony, weigh the evidence, determine knowledge and motive, and draw all factual inferences and resolve all doubts in favor of respondents. Such errors are particularly egregious where First Amendment protections are at issue. As the Fifth Circuit stated in *Porter v. Califano*, 592 F.2d 770, 778 (5th Cir. 1979):

> As a general rule a court should use Rule 56 summary judgment most sparingly in a First Amendment case such as this involving delicate constitutional rights, complex fact situations, disputed testimony, and questionable credibilities. This is especially true where the only affidavits supporting the motion for summary judgment come from officials who are attempting to silence a subordinate who has accused them of corruption, where those affidavits are vague and conclusory, and where the administrative record largely shaped by the officials themselves contains clearly conflicting evidence. Courts must not allow Rule 56 and the interests of judicial economy to become a rubber stamp obscuring rights indelibly printed in the constitution.

Furthermore, the state court of appeal did not reach the issues of motive and pretext because it erroneously found that "Mr. Monts' internal complaints were not primarily matters of public concern, and thus, not protected speech," and that "we need not address any of the other issues presented by plaintiff, since without protected speech, there can be no violation of the First Amendment" (Append. B, p. A-8). The court of appeal therefore did not decide whether the record discloses the existence of genuine issues of material fact as to respondents' motive in terminating Monts, or whether the trial court thus erred in granting respondents' motion for summary judgment, each of which issues are ripe for decision on remand.

5. Employment at Will

As if Monts's employment-at-will status were relevant to his claim that respondents retaliated against him for exercising his right to free speech on matters of public concern, respondents complain that "not once does Monts acknowledge that he was an at-will employee who could be discharged at any time, with or without cause" (Oppos., p. 9). However, this Court has made it clear that "[e]ven though [an employee] could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283, 97 S.Ct. 568, 50 L.Ed.2d 471, 481 (1977).

So what do respondents hope to gain by complaining to this Court that "not once does Monts acknowledge that he was an at-will employee who could be discharged at any time, with or without cause" (Oppos., p. 9)? No doubt they hope to gain the same unfair advantage they seek (and have successfully obtained thus far in this litigation) in falsely stating that "Petitioner's position" is "that all public employee

criticism is protected speech" (Oppos., p. 2), in falsely accusing Monts of suggesting or implying "that the Fourth Circuit ruled that *all* violations of safety or building codes are not matters of public concern" (Oppos., p. 8) (emphasis in original), in falsely accusing Monts of suggesting that the state court of appeal held "that the private or 'internal' nature of the speech *per se* precludes First Amendment protection" (Oppos., p. 6) (emphasis in original), and in falsely implying that a "trier of fact" has decided the issues of motive and pretext (Oppos., p. 17 n.5), among numerous other falsehoods propagated throughout their opposition brief and indeed throughout this litigation. But by now, of course, respondents should have Zero (0) credibility in this Court.

Conclusion

This Court noted in *Connick*, 461 U.S. at 150 n.10, 75 L.Ed.2d at 722 n.10 (citations omitted):

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . are of a character which the principals of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." Because of this obligation, we cannot "avoid making an independent constitutional judgment on the facts of the case."

In this case, the Louisiana courts engaged in no such analysis. Rather, the Louisiana court of appeal, with the

Louisiana Supreme Court's blessing, summarily concluded that Monts's communications involving fire and safety code violations and the unauthorized practice of engineering and other improper acts and practices on the campus of a public university did not address matters of public concern. The Louisiana courts thus failed in their "constitutional obligation to assure that the record supports this conclusion," *Rankin*, 483 U.S. at 386, 97 L.Ed.2d at 325, particularly in view of the self-evident, overriding importance of the rights and duties of government employees and particularly professional engineers to inform the public of abuses of power and misconduct by their superiors.

For these reasons and for the reasons set forth in Monts' petition for certiorari, this Court should grant Monts's petition for a writ of certiorari to the Louisiana Supreme Court, should review and reverse the Louisiana Supreme Court's Order denying Monts's application in that court for writs of certiorari, mandamus, or review, and should remand the matter to the Louisiana Supreme Court "so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment." *Givhan*, 439 U.S. at 413, 58 L.Ed.2d at 623.

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